No. 154.

FILED
NOV 4 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 4, 1901.

No. 154.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

against

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY AND OTHERS.

Brief in Reply,

for the Appellant, The Interstate Commerce Commission.

S. H. COWAN,
W. A. DAY,
DAVID WILLCOX,
Of Counsel.

JAMES M. BECK,
Assistant Attorney General.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

AGAINST

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY and others,

October Term, 1901.
No. 154.

BRIEF IN REPLY,
for the appellant, The Interstate Commerce Commission.

A leading feature of the appellees' brief is its singular misconception of the provisions of the tariffs imposing the $2 charge. In the brief for appellant (p. 11), attention is called to the fact that the appellees state that the circulars separated the terminal service from the preceding transportation service and made a separate charge for each service. This statement is now repeated in various forms (Brief for Appellees, pp. 5, 15, 23, 31). But as already said in the appellant's brief (p. 11), this is merely imaginary as the tariffs describe the additional $2 charge as "a charge in *addition*" to the *existing* Chicago rates (Record, pp. 196, 198, 206, 207, 208, 209, 213, 214, 217, 230, 244, 246), a charge to be "*added* to the through rate" (Record, p. 196, 213, 214, 217), and the appellees' brief (pp. 31, 52) admits that this rate already covered all so-called terminal expenses. As the appellees brief itself says (p. 7), the present controversy is in regard to the reasonableness of this addition.

The brief for the appellees (p. 7) states that in Walker vs. Keenan (73 Fed. Rep., 755), it was held that the Atchison circular effected a separation of the through rate from the terminal charge, and similar statements are made at later points in the brief (pp. 67, 68). It has been already pointed out (Appellant's Brief, p. 32) that there was no suggestion in that case that the through rate already covered transportation to the stock yards and was reasonable compensation for the entire service, and that the so-called terminal charge was by its very terms a mere "addition" to the through rate rendering the same unreasonable. This distinction between the cases is stated in appellee's brief which says (p. 7), "the general "purpose of this application to the Commission was to have the "terminal charge declared unreasonable—the previous controversy "having been over the legality of that charge, even if reasonable in "amount."

The statement in appellees' brief (pp. 14–17) regarding the grounds of the Commission's decision is singularly confused. The whole matter is absolutely simple. Prior to June 1, 1894, the Chicago rate of the appellees covered delivery at the Stock Yards. This was explicitly found by the Commission (Record, p. 51). It is now admitted by the appellees' brief which says (p. 31): "It "may be admitted that before these tariffs went into effect ap- "pellees did, in fact, deliver live stock at the Stock Yards for "the ordinary Chicago rate"; and again (p. 52): "Nobody can "contend that a general transportation charge does not include "the initial receiving service and the terminal delivering service, "when it is not stipulated otherwise in the contract." Upon June 1, 1894, the appellees were compelled to pay a trackage charge of one dollar per car. Thereupon they levied a charge of two dollars per car, as their circulars in terms state as an *addition* to the *existing* Chicago rate (*supra*, p. 1). The Commission held that as they were already receiving compensation for this service the carriers ought not charge for it a second time. This appears in the quotation in the appellees' brief (p. 17) from the opinion of the Commission as follows: "What the carriers "have done here is to add an arbitrary sum for a service for which "they are already receiving a reasonable compensation" (Record, p. 51).

The grounds of the Commission's decision are so simple that it seems unnecessary to waste time in following the appellees' laborious discussion upon the subject and this will not be at-

tempted. So, too, various inaccurate statements are made in regard to the appellant's contentions; but these will not be answered in detail, as it is assumed that the appellant's views will be gathered rather from its own statements than from those of its opponents. A brief reply will, however, be made to the points contained in the brief for the appellees in similarly numbered paragraphs.

I.

The objection in appellees' brief (pp. 22–29) that the orders of the Commission are an attempt to prescribe maximum rates is answered in appellant's brief (pp. 17, 18).

The rule established by the authorities is there pointed out—namely, that while neither court nor Commission has power to make rates, there is full power to decide whether those made by a carrier are reasonable, and to restrain their enforcement if unreasonable. The appellees criticize the fact that the Commission made a recommendation that nothing should be added to the Chicago rate save the added trackage charge. This was entirely logical, since the added trackage charge was the only new feature in the situation (Record, pp. 42, 43). The propriety of recommendations by the Commission, too, is recognized in Section 14 of the Interstate Commerce Act.

This point amounts merely to an argument that the Commission is absolutely without power regarding rates, however unreasonable they may be.

II.

The appellees' second point (Brief, pp. 29–32) is that the tariffs of June 1, 1894, themselves show that the $2 charge established thereby is not a second charge imposed for services which the appellees had agreed to perform at the ordinary Chicago rates.

This point is answered upon pages 29-31 of the brief for the appellant. Its emptiness is shown by the discussion contained in the appellees' brief. The brief says: "It may be admitted that "before these tariffs went into effect appellees did in fact deliver "live stock at the Stock Yards at the ordinary Chicago rate" (p. 31); and again (p. 52), "nobody can contend that a general transpor- "tation charge does not include the initial receiving service and the "terminal delivering service, when it is not stipulated otherwise in "the contract." The present contention is that the tariffs *ipso facto* altered that situation. Once more it may be said that the tariffs, by their terms, imposed a charge "in *addition* to the Chicago "rates—in *addition* to the rates named to or from Chicago—in *addition*" to the *existing* Chicago rates (*supra*, p. 1); and they do not purport to name the places between which the carriage would be made, as they should have done under Section 6 of the Interstate Commerce Act, if they were intended to cover carriage between certain points.

> The precise language of the act is, "the schedules printed "as aforesaid by any such common carrier shall plainly state "the places upon its railroad between which property and "passengers will be carried" (Sec. 6).

It is perfectly clear that this was merely an addition to the rate already existing without any addition whatever to the service rendered, or change in the destination reached by the through rate.

The question before the Commission was whether this addition was reasonable without any change in the character of the service. The appellees' contention is that it must be deemed to have been so because the carriers imposed the charge. This is answered by the citation from Interstate Commerce Commision vs. Alabama Midland Co. 168 U. S., 144, already made upon appellant's brief (p. 29), where the court said in explaining some expressions of the opinion below, "it does not mean that the action of the carriers in "fixing and adjusting the rates, in such instances, is not subject to "revision by the Commission and the courts, when it is charged "that such action has resulted in rates unjust or unreasonable, "or in unjust discriminations and preferences" (p. 173).

III.

The third point in the brief for the appellees (pp. 33–69) is that it was competent for them to establish different charges for different services—namely, a charge for transportation to the end of their own tracks and a further charge for transportation from that point to the Stock Yards and delivery there.

The argument regarding the meaning of the tariffs contained upon pages 34–37 of appellees' brief has been just answered. The appellees endeavor to show inconsistency upon the Commission's part by referring to its inquiry concerning the cost of hauling from the junction point to the Stock Yards (pp. 34, 35). A defense based upon those facts was contained in the answers, and, therefore, the duty of inquiry was imposed upon the Commission. It has been already pointed out that the Commission did not in the language of the appellees' brief, "treat the charge as laid for both the hauling and the delivery services after leaving appellees' roads" (p. 35), but as an arbitrary addition to a through rate which already covered those hauling and delivery services (Record, p. 51). The appellees' brief misconstrues the recommendation of the Commission on the subject of terminal charge (pp. 35, 36). That recommendation was that no charge should be made *exceeding* one dollar, not that "appellees make a $1 terminal or switching charge" (Appellees' Brief, p. 36).

The quotations upon this subject from opinions of the courts (Appellees' Brief, p. 37), are of no force. In the Keenan case the point was not suggested or considered that the tariff could not be regarded as separating the charge because the entire charge was already covered by the existing rate. In the present case Judge KOHLSAAT'S view regarding the segregation of the freight charges merely expresses an opinion as to a question of fact which is concluded by the Commission's finding that no such segregation was made (Record, pp. 51, 53).

The discussion regarding the power of a carrier, "to make a "separate charge for a distinct special service, instead of making a "single aggregated charge for the total of all its services" (p. 37), covers thirty pages of the appellees' brief (pp. 37–69). It may be an important question whether, as contended, railway charges should be made in similar form to plumbers' bills, but that question is without application to the present case. The tariffs themselves

(*supra*. p. 1) and the finding of the Commission show that no such separate charges have been made in this case, but that there has been merely an *addition* to the *existing* through rate (Record, pp. 43, 50, 54). At all events no terminal charge can be collected from the shipper for what it costs the carrier to furnish and reach its own facilities (Covington Stock Co. vs. Keith, 139 U. S. 128), and this was the case here as the stock yards were in fact the carriers' depot in Chicago for delivery of live stock (Record, pp. 24, 25, 50). Under these circumstances the appellees' brief very properly apologizes (p. 38) for its prolonged discussion of the question in the abstract.

Perhaps no part of the brief illustrates more strongly the fondness of counsel for excursions outside of the record. For example, the brief states that "itemized charging * * is promotive of "fair charging and of good understanding and feeling about "charges" (p. 38). But the fact is that no charge such as the present is known anywhere else in this country, and the Commission has, therefore, found (Record, p. 28) that "whatever charge is made is in "all cases absorbed by the carrier, for in no instance except at "Chicago is a terminal of this sort imposed upon live stock." Naturally, therefore, this charge has been promotive principally of prolonged and almost acrimonious litigation for the purpose of enforcing "the law's inhibition of unreasonableness in a "carrier's methods" (Brief for Appellees, p. 38). Notwithstanding the finding of the Commission just stated, the appellees' brief, pursuing its wanderings from the record, says: "there is "no novelty in distinct charges for special parts of a railway's "services. They have long been common, both in this country and "in England" (p. 39). It then refers to charges which are understood to exist on traffic moving over the St. Louis bridge. This has no similarity to the present terminal charge; is the only known case where a bridge expense is charged separately to the shipper, and in the case of the St. Louis bridge the charge applies only to shipments between St. Louis and eastern points while, as to all other business, including live stock shipments to Chicago, the bridge charge is absorbed in the through rate. The appellees' brief further asserts that switching charges are made as separate charges (p. 40). While charges may be made for carrying freight to special delivery points, no instance is known of a case where a general terminal charge is sought to be added to a general through rate to the carrier's own depot. Such charges are always absorbed in the through

rate and deducted before *pro rating* between the carriers. They are not made the subject of a separate charge to the shipper.

It is not deemed useful or necessary to follow the discussion regarding the practice pursued in England as to separate items of charge (Appellees' Brief, pp. 41–46). As just said, there is nothing similar in railway practice in this country. So far as the question of public policy goes, Section 7 of the Interstate Commerce Act indicates the policy that shipments shall be treated "as one continuous carriage from "the place of shipment to the place of destination." This policy would obviously apply to the charges for such carriage, and since Congress has only limited power over transportation in this country the English law or practice is without application, and Congress cannot be deemed to have intended any change in the rules previously prevailing. The only authority upon the subject is the Covington Stock Yards Case, 139 U. S., 128, which it has been shown is against any such practice of separation (Appellant's Brief, pp. 34–36). Appellees' argument, too, is fully answered in the opinions of Judge GROSSCUP (Record, p. 265, 64 Fed. Rep., 992).

It is worthy of note that one consideration which the brief for the appellees urges in support of the system of separate charges is that those who do not desire all the services have an opportunity of avoiding such items of charge as are for services not needed by those shippers (pp. 47, 48, 51, 63). This is seriously advanced as an argument in favor of the right to charge for shipment to the end of appellees' roads, where there are no facilities for unloading cattle, and no shippers desire their delivery (Record, p. 25), and then making an additional charge for delivering the cattle at the Stock Yards, which the carriers have made their own depot for that purpose, and where all cattle are delivered. In the words of the Commission "if the option is nominally given the shipper, it "does not leave him any real choice. If his stock is to be marketed "at Chicago, it must go to the stock yards, and can only go in this "manner, as both he and the carrier perfectly understand (Record, "p. 25) * * it is absurd to say that the Chicago rate paid for "the transportation of that stock up to some switch in the field "or in the city where there was no facility for a delivery, and that the "transportation beyond that point was a gratuity" (Record, p. 50).

Great importance is given to a provision of the Interstate Commerce Act that the rate schedule shall state separately any terminal

charges (Sec. 6). In view of the fact that all common law rights are preserved, unless the statute is clear to the contrary (Western Union Co. vs. Call Co., 181 U. S., 92), it seems hardly likely that Congress intended to make any change in the common law upon this subject. So, too, the other provisions of the Interstate Commerce Act upon which reliance is had (Appellees' Brief, pp. 49–51) are manifestly for the purpose of bringing lawful charges of the sort within the operation of the Act rather than of authorizing charges which were otherwise unlawful. It seems scarcely possible that Congress intended to enact any new law upon the subject which, as it would apply alone to inter-state shipments, would lead to endless confusion arising from differing rules regarding intrastate business.

The discussion of the Covington Stock Yards Case (Appellees' Brief, pp. 52–55) is answered upon pages 34–36 of the brief for appellant. The appellees' contention seems to be that the Covington case held that such separate charges could be made when authorized by a special contract (Brief for Appellees, pp. 52, 53), and that this rule applies to the present case, because the appellees announced on June 1, 1894, that as to any subsequent shipper a separate charge of $2.00 would be made in addition to the existing rate. In this way the appellees seem to think that a special contract within the Covington case was made as to all subsequent shippers, notwithstanding that they had no option upon the subject, as found by the Commission (Record, p. 25). This is erroneous because the court, in the Covington case, announced the general rule as to the obligation of a carrier and applied the same, although there was no special contract in the case between the carrier and the shipper. Moreover, the appellees' contention begs the real question, which is, whether this additional imposition by the carriers was reasonable under the circumstances of the case. Even if there were a special contract it would be good only in case it was reasonable.

For reasons just stated it seems unnecessary to follow the further statement of English principles contained upon pages 58–62 of the appellees' brief. Aside from the objections to matters of the sort, already suggested, those cases are not parallel to the present because here the appellees have made the Stock Yards their depot for the delivery of live stock (Record, pp 25, 50), while in those cases the charge was made for "getting cars to a special place" (Appellees' Brief, p. 59).

Further excursions outside of the record may be noted. Thus,

it is stated upon page 64, that the rates are constantly fluctuating. No proof of the sort was made, and as to live stock rates, owing to the fact that the traffic is gathered at local points, this is not the case. Again, it is stated (p. 64), that perhaps most of the live stock rates to Chicago are made from shipping points on the roads of companies other than the appellees. In point of fact at least eighty per cent of the business to Chicago originates on the roads of the appellees.

The discussion in regard to whether the appellees have made the Stock Yards their Chicago depot for the delivery of live stock, contained upon pages 65–68, consists largely of verbal criticisms, but its substantial result is that the live stock business consisted really in delivering cattle at the Stock Yards and nowhere else, as so abundantly found by the Commission. As this was so prior to June 1, 1894, no additional service was rendered thereafter justifying the increase of rates (Record, pp. 42, 43). The baseless claim which was persistently urged in the pleadings and on argument below, (Record, p. 25, 50), that prior to June 1, 1894, the service for delivery at the Stock Yards was made gratuitously while subsequently a proper charge was made therefor, seems now to be abandoned.

IV.

The fourth point of the brief for appellees is that under the Interstate Commerce Act the courts are to exercise their independent judgment upon the facts, and that the conclusions of the Commission upon questions of fact must be rejected by the courts when they are not warranted by the Commission's special findings or by extraneous evidence (pp. 69–76). The rules as to this are fully stated in the brief for appellant (pp. 25–28).

In addition, it may be observed that the evidence before the Commission is not contained in this record, having been rejected under the objection of the appellees (Record, p. 274). There is nothing in the record showing that the Commission made special findings upon all the facts, nor indeed was it bound to do so. It did find the ultimate fact that the imposition of the charge in question under the

circumstances was unreasonable. That finding under the statute is entitled to effect as *prima facie* proof. The contention of the appellees that the special findings of the Commission are inconsistent with this ultimate finding is based merely upon the Commission's finding that the cost of the terminal service was not less than the amount of the additional $2 charge (Appellees' Brief, pp. 9, 12, 15, 56). But this was not at all inconsistent with the finding that the appellees were already being paid for this service, and that it was, therefore, unreasonable to impose a further charge therefor.

V.

The fifth point contained in the appellees' brief is that only the $2 charge and not the general Chicago rate was investigated by the Commission, and that the only question in the proceeding is whether the terminal charge is in itself lawful. But the question of the aggregate rates and charges including the $2 charge has been from the beginning the question at issue. That issue was clearly made in the pleadings (Petition, Rec., p. 9; Answers, pp. 70, 79, 88, 104, 109, 129).

The brief attaches considerable importance to some expressions in the opinion of the Commission to the effect that the through rates have been reduced (p. 78). This is fully answered by the Commission's finding upon the rehearing that the "reduction did "not, however, apply to all the territory to which the terminal charge "applies, but only to certain limited portions of that territory, and the "purpose of it was to equalize the rate from those sections as com-"pared with other sections. There is no claim that this reduction "was made on account of the imposition of the terminal charge, "or that it would not have been made had no terminal charge been "imposed, nor that, if the Chicago rate, June 1, 1894, ought to "have carried with it a delivery at the stock yards the present "rate should not likewise do so" (Record, p. 53). It should be observed also that the appellant's efforts to make proof upon the trial as to the actual facts were defeated by the appellees' objection (Record, 145-157). The appellees contend that the through rates were not the subject of examination because they are so numerous that it would be physically impossible for the Commission to make such examina-

tion (Appellees' Brief, p. 79, 80), and, therefore, there must be a failure of justice. There is no evidence that such was the case; the appellees started to make proof under their allegations that the rates were too low, but abandoned the matter, leaving the Commission nothing to consider upon the subject, except the presumption that the railroads had made compensatory rates.

This entire point misapprehends the ultimate question involved, which is not whether the through rates alone were reasonable, but whether it was proper to add to such rates a second charge for performing a service which appellees now concede (Brief, pp. 31, 52) was already covered by the existing rate.

VI.

The sixth point of the appellees' brief is that the terminal charge is shown by the Commission's findings to be less than the actual cost of the service, and is therefore conclusively proved to be reasonable (pp. 80–90).

This, again, misconstrues the ultimate question, which, as just said, is whether it was proper to add to the existing through rates a second charge for a service which was already covered by those rates. The appellees argue that there was no proof that the through rates were themselves reasonable and were not unreasonably low, and that, therefore, it cannot be claimed that the addition of the terminal charge rendered them unreasonably high. The appellees suggest that the appellant assumes that the rates before June 1, 1894, were exactly right, "though there is no evidence whatever on that point" (p. 84). Once more it may be said that the evidence upon which the Commission based its findings is not before the court, although it is a fact that the tariffs of the appellees were referred to as part of the complainant's petition (Record, p. 13), and that the Commission's finding that those rates must be taken as reasonable is not shown to be erroneous. The expressions of the Commission upon that subject were as follows:

> "Some attempt was made on the hearing to show that "the present rate (through rate) was unreasonably low, and

"some attempt was made, on the other hand, to show that "it was unreasonably high. Nothing was developed on either "side, however, which warrants a finding of fact, nor do "we understand that either party seriously makes any claim, "that the Chicago rate is unreasonable, either as being too "high or too low" (Record, p. 25).

"May 31st, there was in effect a certain rate on live stock "from various points to Chicago, and that rate, upon the "record in this case, must be taken to be a just and reason- "able one. The defendants intimate in their answers that "this rate has been forced down until it was too low, and "something was said in the proof looking in the same direc- "tion. Upon the other hand the complainants started in to "prove that the rate at that time was too high; but, as is "found by the case, both these claims were virtually aban- "doned. There is nothing in the record before us to show "that the rate was other than a right one, and we assume "that May 31st the rate in effect was just and reasonable" (Record, p. 49).

Again, upon rehearing:

"We think and find that the Chicago rate on May 31, "1894, included, as it had included for the last thirty years, "a delivery and unloading of the stock at the Union Stock "Yards, and that rate, upon the record in this case, was a just "and reasonable one" (p. 50, see also pp. 54, 55).

"For many years previous to June 1, 1894, the defendants "had maintained a certain fixed relation in rates between "these different cattle markets. On June 1st they increased "the expense of placing cattle upon the Chicago market by "just $2 per car. If the relative rates were right before, "and we may fairly presume, in the absence of any claim to "the contrary, that they were, this charge disturbed those "rates to that extent" (Record, p. 54).

It will be observed that appellees in their answers set up as a defense and justification for making the $2 charge that the Chicago live stock rates had become too low. This was in the nature of a special defense which they thought necessary to allege, and the burden was upon them to prove it, but they did not do so. The fact was that they had voluntarily maintained for years the rates, whatever they were, and the fair and logical deduction was that such rates were, to say the least, sufficiently high to be a reasonable compensation for the service customarily performed. It would scarcely be rational to contend otherwise in the absence of evidence to show that such was not the fact. If such evidence existed it was best known to the appellees, and it is a familiar rule of evidence that the burden of proof is upon

him who has peculiar knowledge of the fact, and every presumption is indulged against him if he fails to produce the evidence. It is legitimate to presume that, if the facts were favorable, appellees would have proved them. They were well aware when the case was before the Circuit Court of the presumptions which the Commission had indulged. They thought it necessary to again plead that the through rates had become too low as a justification for the terminal charge, but did not prove it.

> In Interstate Commerce Commission vs. East Tennessee Company, 85 Fed. Rep., 107, the court said (pp. 114, 115), "I think the question of the justness and reason-
> "ableness of rates under the first section is colored
> "by the other provisions of the law, and by
> "the general policy of the whole enactment, which is
> „ to effect the equality of charges. And, at all events, it
> "seems to me clear that the charges accepted for a longer
> "haul may be referred to for the purpose of considering
> "the reasonableness of charges made for the shorter haul.
> "Such comparisons are applied to every other kind of busi-
> "ness, and the fact that there may be competition in such
> "business would not be a controlling consideration, for the
> "presumption would always be that the compensation
> "charged for the service or thing is sufficient to be reasona-
> "ble. The presumption is not, of course, a conclusive one,
> "but would seem a fair one in the absence of special circum-
> "stances." These principles were not criticized in the subsequent opinions in the case (99 Fed. Rep., 52; 181 U. S., 1).

Therefore, it cannot be claimed that the Commission's finding of this presumption of fact—that is, that the through rate was reasonable and just—is contrary to law or unsupported by the evidence. On the contrary, it is but the necessary conclusion from the very acts and conduct of appellees. While the Commission finds it as a presumption, it is no less a fact proven by circumstantial evidence, and the circumstances are such that no other conclusion can be reached.

The brief of the appellees again takes refuge behind the difficulty of showing the facts as to the numerous Chicago rates (pp. 85, 86). Those rates, it says, should not be taken as reasonable because it would be almost impossible to prove that affirmatively in regard to each one of them. The contention seems to be that as that fact is difficult of proof, therefore there must be a failure of justice. Again, the brief says that the element of unreasonableness, if any, must be in the Chicago rate rather than in the terminal charge, because the terminal charge is shown to be less than the expense of

delivery at the Stock Yards. This again curiously misapprehends the point decided by the Commission. This was that the Chicago rate was presumptively reasonable; that it actually included the terminal services; that the addition of $2 to the rate without any addition to the services rendered, made the rate unreasonable, and that the removal of the $2 charge would restore the previous condition of reasonableness. It seems scarcely necessary to follow the appellees' brief in its minute verbal criticism of the language of the Commission (pp. 88, 89). It must be evident that the decision of the Commission was as just stated.

VII.

The seventh point of the brief for appellees is that the terminal charge does not constitute an undue prejudice against Chicago (pp. 91–95). This is discussed in the appellant's brief, pages 10, 17, 24, and is satisfactorily answered in the extract from the opinion of the Commission therein set forth (p. 10).

VIII.

The eighth point of the brief for appellees is that the Interstate Commerce Commission is not empowered to administer the Anti-Trust Act (pp. 95–98). This is answered by the appellant's brief, pages 22–24. The point upon which so much stress is laid, that the violation of the Anti-Trust Act was not pleaded or found by the Commission, is met by Gibbs vs. Consolidated Gas Company, 130 U. S., 396, where the illegality of a contract was not raised by the pleadings, but merely appeared upon the trial, and yet the court refused to enforce it.

The appellees' treatment of this objection is singularly inconsistent, in view of the fact that at an earlier stage of the case they made a motion to dismiss the intervening petition of the Chicago Live Stock Exchange, upon the ground that it was an illegal combination within this statute (Record, pp. 31, 32).

IX.

The questions as to the exclusion of evidence are discussed upon appellant's brief, pages 20, 22, 30.

X.

The discussion as to whether a court has jurisdiction to modify orders of the Commission seems not to be specially important at present. It may be observed, however, that under the Interstate Commerce Act, Sec. 16, the court has the general powers of a court of equity to determine the matter "in such manner as to do "justice in the premises."

Conclusion.

As already said (Brief for Appellant, p. 37), the case is extremely simple. The defendants were charging a reasonable rate to Chicago, which, as the appellees now admit (Brief, pp. 31–52), included delivery at the Stock Yards. Upon June 1, 1894, the appellees, in their own words, "added to the Chicago rate" a so-called terminal charge of $2 per car. As just said, the rate was reasonable before that time; nothing new occurred save an addition of $1 to the expense of performing the service; there was no change in the character of the service. Manifestly, it was unreasonable to add to the rate twice the amount of the added expense. These simple propositions were found by the Commission, and are not shaken by the voluminous attack which the appellees have made upon them.

It is, therefore, again submitted that the decree should be reversed, and the cause remanded to the Circuit Court, with instructions to enter a decree for the complainant.

S. H. Cowan,
W. A. Day,
David Willcox,
Of Counsel.

James M. Beck,
Assistant Attorney-General.

No. 154.

Sup. Ct. Brf. of Willcox for Appt.

Office Supreme Court U. S.
FILED
NOV 13 1901
JAMES H. McKENNEY,
Clerk.

1968

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 13, 1901.

No. 154.

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

CHICAGO, BURLINGTON AND QUINCY COMPANY AND OTHERS.

Memorandum Regarding Corrections of Citations of Record Contained in Briefs for Appellant.

(1.) Principal brief, p. 4, line 5 from the bottom, the citation "pp. 24, 25" should read "pp. 24, 33."

(2.) Principal brief, p. 28, line 15 from the top, citation "p. 271" should be "p. 250."

(3.) Brief in reply, p. 2, line 20 from the top, citation "p. 51" should read "pp. 50, 51."

(4.) Brief in reply, p. 5, line 17 from the top, citation "p. 51" should read "pp. 50, 51."

(5.) Brief in reply, p. 9, line 4 from the bottom, citation "p. 274" should read "p. 250."

(6.) Brief in reply, p. 11, line 6 from the bottom, citation "p. 13" should read "p. 10."

The authority to which Mr. Day referred in the argument as to be noted under subdivision I of the brief in reply for the appellant is Aberdeen *vs.* Northern R'y Co., 3 Railway and Canal Cases (Neville & Macnamara), 205, 231, and 232.

DAVID WILLCOX,
Of Counsel for Appellant.